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No. 84-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, et al.,
Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,

BRIEF OF JOHN C. YOUNGMAN, JR., RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the establishment clause requires the denial of permission to meet during regular school hours of compulsory attendance to a student initiated and composed group, supervised by a school teacher, meeting on school property in school rooms, and wishing to meet for religious exercise, including prayer, during the first classroom period of the day on two (2) days per week when student clubs having direct or indirect relation to the curriculum and which promote the intellectual, physical and social development of students meet.

PARTIES TO THE PROCEEDING

The Williamsport Area School District did not appeal from the judgment of the District Court. The appeal was taken by Appellee herein. However, the School District and all Defendants in the original complaint filed in this matter may be affected by this appeal.

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I. The Case of Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) is not controlling of the case at bar, since:

(A) It is factually distinguishable from the case at bar for the following reasons:

1. The education institution was a university.
2. The university had created an open forum.
3. The forum was available to a broad class of non-religious as well as religious speakers.
4. The university students had reached an age of maturity and were adults for all practical purposes, free to make decisions contrary to their home environment and training even to converting to other religions.
5. College attendance is voluntary, not compulsory.
6. No supervisor of the group was required.
7. The facilities of the university were open to groups and speakers of all kinds.

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8. All costs were not borne by the taxpayer, but in part by student activities fees 6

(B) This Court by its denial of certiorari in the case of Jaffree v. Board of School Commissioners, 705 F2d 1526 (11th Circuit 1983), cert. denied, 104 S.Ct. 1707 (1984) and by its refusal to grant certiorari in the case of Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F2d 1038, reh. denied, 680 F2d 424 (5th Circuit 1982), cert. denied, 103 S.Ct. 800 (1983) has already indicated that Widmar v. Vincent is not controlling at the case at bar 9

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III. The Equal Access Act has no applicability in the case at bar since (A) all facts and actions in the case at bar occurred prior to the passage of the Equal Access Act, (B) no record has been made concerning the application of the Equal Access Act, (C) the Equal Access Act is not applicable to the case at bar even if the record were made during a time relevant to the Equal Access Act and (D) the Equal Access Act

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THE WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COUNTER STATEMENT OF CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Appellee agrees that the First Amendment to the United States Constitution which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or of abridging the freedom of speech . . .

is involved in this case.

Appellee does not agree that the Equal Access Act, Title VIII of Public Law 98-377 enacted on August 11, 1984, is applicable to this case.

COUNTER STATEMENT OF THE CASE

The facts as stated in the Opinion of the Court of Appeals at App. 4-10 inclusive, more accurately describe the facts applicable to this case and are

incorporated herein by reference as part of Appellee's Counter Statement of the Case.

Appellants attempt in their brief at Pages 2 and 6 to emphasize the physical "isolation" of the school and that an offer of off-campus released time as "an empty offer," because there would be no "independent transportation" is not so in the view of Appellee. First, students may drive by special permission or their parents may drive them (J.A.246). Second, while it is approximately a 3/4 mile walk from the beginning of the campus to the school building and the nearest residence to the school buildings is approximately one (1) mile away, the nearest church is approximately 1½ miles from the school buildings and approximately ½ mile from the beginning of the school campus. Third, while it is true that the school district does cover a fairly large area although the joint appendix does not place that at 100 square miles as stated in Appellants' Brief at Page 2, the vast majority of the students reside within the city limits of Williamsport as physically does 98% of the school campus (J.A.248).

The Williamsport Area High School comprises grades 9 through 12 (J.A.249). The ages generally of students in grades 9 through 12 of a public high school are 14 through 18 (Judicial Notice). In fact, the original proposal by the group to the superintendent of schools was that the group would "read some scriptures and pray to God that he might edify our minds" (J.A.83). The final proposal also stated that the meetings of the organization would be supervised by a faculty advisor and student attendance would be verified by the signing of a roster (J.A.87).

The activity periods at the high school are regularly scheduled times during the school day which occur between 7:57 a.m. and 8:27 a.m., usually on Tuesdays and Thursdays of each week (J.A.365), although any day of the week can and has been

designated as an "activity day" (J.A.365). Activities or clubs that have been and would be approved are those which promote the intellectual, physical and social development of students. The current student activities so sponsored by the school district are:

Student Government
Key Club
Class Organizations (student class officers and executive board)
Library
Business English Club
Future Homemakers of America
Vo-Tech Club
Speech and Drama Club
Ecology Club
The Cherry & White (student literary art magazine)
Billtown Banner (student newspaper)
La Memoire (student yearbook)
Band (concert and marching bands)
Choir

Among the activities and clubs which have existed in the past and which could be renewed if student interest warrants are: Archery, Art, Audubon, Aviation, Chemistry, Chess, Field, Forest and Stream, Future Nurses and Future Teacher clubs. Others include the Bowling, German, Poetry, Photography and Ski clubs (J.A.366,367).

All of the clubs have faculty advisors or monitors assigned to them (J.A.366). The faculty advisors have not been instructed not to participate in the student clubs and activities (J.A.266). The proposal for the club in the case at the bar did state that the group would be interdenominational (J.A.87), although the nature of the organization according to the proposal was that it would be a nondenominational prayer fellowship (J.A.87).

The statement appearing on Page 8 of Appellants' Petition that "no students at the school believed that the meetings were 'school sponsored,'" and there was no devisiveness stemming from the meetings based on a newspaper article in the New York Times which involved an interview with several students does not and should not be substituted for the record in this case. First, such interviewing is by no means comprehensive or necessarily representative of feelings of other students in the school. Second, the statement in the article, "but at the Williamsport High School, by all accounts there has been no hint of pressure for students to join PETROS" is directly contradicted by a statement which appeared in the local newspaper, The Williamsport Sun-Gazette, on June 4, 1983 (within 7 days before the appeal was taken in this matter from the decision of the District Court) by Appellants' counsel, Gerald Seevers (whose children were and are members of the PETROS group) regarding what he would expect with regard to proselytization. The article is quoted in part as follows:

> Other students in the school 'have the right to be left alone,' and not be pressured to join a religious group. That is how the superintendent sees the law.
>
> Gerald W. Seevers, attorney for the group and father of one of the members, does not see the court ruling as intended to be so limited.
>
> Conceding that 'the club as a group is not entitled to proselytize,' Seevers said the school district 'can't limit individual members from talking about their faith to other students, and if they do, they'll find themselves back in court.'
>
> 'Children in my church are taught to try to convert others, and I would expect them to do so,' he said.
>
> Seevers went on to say, 'I'm not worried about losing a battle, however. I know God is still on his throne and I have already won the war.'

Moreover, if pressure has not been exerted, it may well be because this case has not yet been finally decided.

SUMMARY OF ARGUMENT

The holding of the Third Circuit Court of Appeals in this matter does not conflict with the holding in the case of Widmar v. Vincent. Not only are there factual distinctions of the educational institution being a university, the forum having some 100 different groups, the maturity of university students as opposed to high school students, the forum being available to religious as well as non-religious speakers and running the gamut of political expression as opposed to the situation at Williamsport High School, the voluntary nature of attendance at college, the unsupervised group and costs being paid in part by student activities fees, but the denial of certiorari by this Court in the cases of Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F2d 1038, reh. denied, 680 F2d 424 (5th Circuit 1982), cer. denied, 103 S.Ct. 800 (1983) and Jaffree v. Board of School Commissioners, 705 F2d 1526 (11th Circuit, 1983), cert. denied, 104 S.Ct. 1707 (1984) indicate that this Court does not see Widmar as controlling in the case at bar.

Contrary to Appellants' assertion, there is no confusion existing among the appellate courts which have considered this matter with respect to student initiated religious clubs meeting for religious exercise during the school day on school property. The reversal of the District Court Opinion in this case (which in Appellants' Brief) has been cured by the Third Circuit's reversal in this case.

The Equal Access Act has no applicability to this case, because it was passed after this case had been decided by the Court of Appeals for the Third Circuit. Whatever applicability such Act might have to a similar set of facts should be developed by an

independent record in which problems peculiar to the Equal Access Act have an opportunity to be fully developed and argued. Finally, the Equal Access Act could not be applied constitutionally to the case at bar if the decision of the Third Circuit Court of Appeals is correct.

REASONS FOR DENYING THE WRIT

I. The case of Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) is not controlling of the case at bar, since:

A. It is factually distinguishable from the case at bar for the following reasons:

1. The educational institution was a university.

2. The university has created an open forum.

3. The forum was available to a broad class of non-religious as well as religious speakers.

4. The university students had reached an age of maturity and were adults for all practical purposes, free to make decisions contrary to their home environment and training even to converting to other religions.

5. College attendance is voluntary, not compulsory.

6. No supervisor of the group was required.

7. The facilities of the university were open to groups and speakers of all kinds.

8. All costs were not borne by the taxpayer, but in part by student activities fees.

The eight distinctions above set forth are all factual distinctions and have been discussed in the various Appellate cases dealing most closely with the issue in the case at bar. The cases in addition to the Third Circuit Court of Appeals Opinion in this

case are Johnson v. Huntington Beach Union High School District, 137 Cal.Rptr. 43, 68 Cal.App. 3d 1, cert. denied, 434 U.S. 877 (1977); Brandon v. Board of Education of Guilderland Central Schools, 635 F2d 971 (2d Circuit 1980), cert. denied, 454 U.S. 1123 (1981), reh. denied, 455 U.S. 983 (1982) and Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F2d 1038, reh. denied, 680 F2d 424 (5th Circuit 1982), cert. denied, 103 S.Ct. 800 (1983).

Appellee disagrees with that part of the Third Circuit Court of Appeals Opinion in this case which concludes that a limited open forum was created in the case at bar.

Both the Brandon and Lubbock cases, supra, dealt with the open forum concept in the high school setting and held that the existence of clubs in such a setting does not create a limited open forum. It is interesting to note that certiorari in the Lubbock case was denied after the Widmar case came down, an indication that the Supreme Court of the United States does not go along with the concept that clubs in the high school setting constitute a limited open forum.

A line of cases has held that the university situation does constitute an open forum. These cases are Healy v. James, 408 U.S. 169, 92 S.Ct. 2338, Gay Lib v. University of Missouri, 558 F2d 848 (C.A. 8, 1977), cert. denied, 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 789 (1978); Keegan v. University of Delaware, 349 A2d 14 (Delaware 1975), cert. denied, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 342 (1976). Additionally, the tradition with universities has been to allow religious groups to exist in their midst. See, e.g., Justice Brennan's Concurring Opinion in The School District of Abington Township v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). The Widmar case is the latest in this line of university cases which grant access to

religious groups in the university setting. The basis for this holding is that the university is the forum where ideas are explored, considered and dealt with. The students are mature enough at that age to deal with such ideas.

However, no appellate court thus far has stated that such maturity and ability to deal with religious problems exist at the high school level. Even the Eighth Circuit in Chess v. Widmar stated that the university situation was different from the high school situation (see 635 F2d 1310 at Page 1319), and distinguished the Brandon case, supra, on just such a basis. The Widmar court itself in Footnote 14 of the Opinion, 102 S.Ct. 269, 276 stated, "University students are of course young adults. They are less impressionable than younger students and should be able to apprehend that the university's policy is one of neutrality towards religion." This Court is asked to take judicial notice that in fact the age group 14 through 18 may be the most impressionable time of a person's life with regard to peer pressure. The Brandon court put the matter very well when it stated, 635 F2d 971, at 978, "an adolescent may perceive 'voluntary' school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the 'captive audience' setting of a school." It is Appellee's experience, as a parent, as a school director, and as a person with an interest in religion that peer pressure for the 14 through 18 age group is great indeed, and that while there may be some students who could distinguish between state neutrality and state advancement of religion, there are many, many students in such age group who simply do not so distinguish for any number of reasons.

While the Third Circuit Court of Appeals concluded that a limited open forum had been created in the case at bar, a contrary conclusion by this

Court would not disturb the holding in the case at bar that the activity is constitutionally prohibited. Thus, while the Appellee believes that a limited open forum was not created in the case at bar, granting certiorari to consider the propriety of such a conclusion in the case at bar would not disturb the holding of the court below. Thus, certiorari should be denied.

B. This Court by its denial of certiorari in the case of Jaffree v. Board of School Commissioners, 705 F2d 1526 (11th Circuit, 1983), cert. denied, 104 S.Ct. 1707 (1984) and by its refusal to grant certiorari in the case of Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F2d 1038, reh. denied, 680 F2d 424 (5th Circuit 1982), cert. denied, 103 S.Ct. 800 (1983) has already indicated that Widmar v. Vincent is not controlling in the case at bar.

This Court denied certiorari in the case of Jaffree v. Board of School Commissioners, 705 F2d 1526 (11th Circuit 1983), cert. denied, 104 S.Ct. 1707. Included in this case were the non-statutory and non-school board policy prayer activities issue as being unconstitutional because in violation of the establishment clause. The Eleventh Circuit Court of Appeals rejected the notion that simply because there was no statute or written school board policy authorizing the activity, the activity was therefore constitutional. Instead, the Court reasoned with Justice Douglas' concurring opinion in the case of The School District of Abington Township v. Schempp, 374 U.S. 203; 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) that if a statute authorizing the activity would be unconstitutional then the activities in the absence of a statute are also unconstitutional. This line of reasoning reaches back to the time of the Schempp case, supra, in 1963 and was enunciated also in the case of Murray v. Curlett, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) and Engel v.

Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). Unless this line of reasoning is no longer valid, it is submitted that this Court's decision not to grant certiorari in the case of Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F2d 1038, reh. denied, 680 F2d 424 (5th Circuit 1982), cert. denied, 103 S.Ct. 800 (1983) is an indication that this Court should not consider the case of Widmar v. Vincent, supra, controlling of the case at bar, inasmuch that if the Widmar case is not controlling in a situation where there is a school board policy allowing a student initiated prayer activity, the same should also hold true where there is no such written policy, but the activity is carried on anyway. The carrying on of the club activities as part of the regular school day and the approval of the various activities by the school district is state action just as much as if there were a written school board policy allowing such activity to be initiated as in the Lubbock case, supra. If Widmar did not control Lubbock, it should not control the case at bar.

II. All appellate courts, both federal and state, which have considered the problem of student initiated religious prayer groups in the public high school have uniformly held that the establishment clause prohibits such activity.

Appellants argue that there is confusion among lower federal courts and school administrators as to whether student initiated prayer groups in public schools are constitutionally permissible. The case law cited by Appellants for this proposition is very sparse. With the exception of the District Court in the case at bar and the case of Reed v. Van Hoven, 237 F.Supp. 48 (Western District, Michigan 1965), all of the cases cited by Appellants in their second argument hold that the activity was unconstitutional. The confusion seems to be limited at present to the Middle District of Pennsylvania, and this has been cleared up by the holding of the Third Circuit

Court of Appeals in the case at bar. It is submitted that a denial of the writ of certiorari in the case at bar would clear up any confusion presently existing in this area and would in fact allow all of the appellate courts which thus far have decided this matter to remain in harmony. It is submitted that the case at bar is not as close a case for the unconstitutionality of the activities proscribed as the cases of Brandon v. Board of Education of Guilderland Central Schools, 635 F2d 971 (2nd Circuit 1980), cert. denied, 454 U.S. 1123 (1981), reh. denied, 455 U.S. 983 (1982), Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F2d 1038, reh. denied, 680 F2d 424 (5th Circuit 1982), cert. denied, 103 S.Ct. 800 (1983) and Johnson v. Huntington Beach Union High School District, 137 Cal.Rptr. 43, 68 Cal.App. 3d 1, cert. denied, 434 U.S. 877 (1977). Inasmuch as the Brandon and Lubbock cases involved before and after school activities rather than activities conducted during the regular school day when pupils are present in the school buildings by compulsion and not by choice they are more difficult cases than the case at bar. The Johnson case involved the school lunch hour and therefore is more nearly on point with the case at bar than the cases of Brandon and Lubbock, supra. Thus, it is submitted that granting certiorari in the case at bar may actually cause more confusion than it dispels.

III. The Equal Access Act has no applicability in the case at bar since (A) all facts and actions in the case at bar occurred prior to the passage of the Equal Access Act, (B) no record has been made concerning the application of the Equal Access Act, (C) the Equal Access Act is not applicable to the case at bar even if the record were made during a time relevant to the Equal Access Act and (D) the Equal Access Act cannot override the First Amendment of the United States Constitution.

Whatever the congressional objective of the Equal Access Act, the facts upon which the case at bar is based all occurred prior to the passage of the Act. (The Act was passed on August 11, 1984, in an election year, and the Petition for Rehearing before the Court of Appeals in the case at bar was denied on August 15, 1984.) Every other fact and action occurring in the case at bar occurred prior to August 11, 1984, with the exception that this Petition for Certiorari, which was filed on November 13, 1984. In addition, the record in this case was developed without the Equal Access Act in mind and, therefore, the Act's provisions as applicable to the fact situation in the case at bar have never been developed or argued. Unless this Court is now going to assume original jurisdiction of such Act as applicable to the case at bar, the contention that the Act is somehow relevant to this case not only is not in accord with this Court's method of dealing with the development of issues, but would frustrate the judicial process, which is based upon the sound and deliberate making of a record and the careful and deliberate review thereof by Courts of Appeal prior to hearing before the Supreme Court. This Court should not frustrate the judicial process by an attempt to inject a Statute passed since the appeal was decided in the case at bar by the Circuit Court of Appeals.

There are many issues to be considered with respect to the Equal Access Act. For instance, as applied to the case at bar, would the activity period by non-instructional time as defined by the Act? In the Williamsport School District, for example, remedial reading instruction occurs at the same time that the activity period occurs at the high school. Furthermore, the Pennsylvania State Education Code provides that the school board may determine when the class day begins and ends, and the same state statute provides that there must be a school year containing a minimum of 990 hours of instruction at the secondary level as the equivalent of 180 school

days. 24 P.S. §15-1504. The Pennsylvania State Department of Education has determined in Basic Education Circular 3-84 dated July 1, 1984, that activities which may be counted as pupil instruction time are "Clubs, Student Councils and similar activities conducted during school hours." If also there is classroom instruction being held at the same time as the activity period is being held, is this considered instructional time or non-instructional time for purposes of the Equal Access Act? This is important in determining the question of whether a school district has created a limited open forum for purposes of the Equal Access Act.

The above is not meant to limit the number of questions of interpretation of the Equal Access Act that undoubtedly will arise as the Act and its effect on public high schools is litigated. It is to say, however, that the Act should not be invoked by these Appellants at this juncture of the case at bar in order to obtain review by the Supreme Court of the United States.

Finally, even assuming that the Equal Access Act applies to the case at bar, the Act could not withstand constitutional muster if it provided for an unconstitutional activity violating the First Amendment of the United States Constitution. Thus, this Court should disregard the Equal Access Act for purposes of determining whether certiorari should be granted in the case at bar.

CONCLUSION

Wherefore, Appellee requests Your Honorable Court to deny the Petition for Writ of Certiorari in the case at bar.

Respectfully submitted,

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